

1 I say, there may be a few that would have -- what I am
2 interested in protecting is something like a trade secret,
3 something that has imminent business impact. But this is
4 pretty much historical information. It is a who did what
5 when kind of a situation.

6 MR. SPITZER: Your Honor, we do not disagree. And
7 I think although most of the records right now have been
8 filed under a seal, I think we can work with Mr. Beckner to
9 come up with an almost comprehensive list that would permit
10 all of these documents to be filed in the public record.

11 JUDGE SIPPEL: And what --

12 MR. SPITZER: So, I think that we agree with your
13 analysis of the situation. We will work with Mr. Beckner to
14 sharply limit the number of documents that would not fall
15 into that public category.

16 JUDGE SIPPEL: All right, well, let us take it
17 that way, then. Let us take it piecemeal. First of all,
18 the exhibits that are already with the summary decision
19 record will -- selective documents will be taken and will be
20 used for purposes of this hearing. They will be separately
21 marked. You are going to introduce a document through your
22 witness. It will be called Liberty/Bureau Exhibit One. And
23 for Time Warner, the same way. You select your documents
24 from that category and you're going to mark yours as Time
25 Warner or Time Warner/Cablevision Exhibit One, et cetera.

1 And if there are going to be documents outside
2 that universe -- that is, outside the summary decision
3 universe -- then, you know, they are going to have to be
4 identified, too. But -- and you can discuss this,
5 certainly, with your clients -- I am looking towards getting
6 all of this information, all of these documents, on the
7 public record as part of this proceeding. And the testimony
8 will be testimony that will be taken and put on the public
9 record.

10 Now, that brings us over to the depositions. And
11 my inklings are the same way with the depositions. There is
12 no question but that these witnesses are going to be
13 cross-examined on the deposition testimony they gave. And
14 the depositions are then going to have to come into the
15 record. Or, at least those portions on which they are
16 cross-examined are going to have to come into the record.

17 I have done that, I have worked with portions, if
18 it can be understood. If a disinterested person reading the
19 record carefully can understand that, from the excerpts of
20 the deposition and the cross-examination, nothing gets lost
21 in the transmission, that is fine. But the other side
22 usually has the opportunity under the rule, I believe, to
23 have the whole deposition introduced. So, I do not know how
24 you want to handle that, but you are going to give that some
25 serious thought.

1 Maybe the easiest thing to do would be to just put
2 them all on. I mean, we have only got four witnesses.
3 Maybe the simple thing to do would be to just, in the
4 admissions session, just put their exhibits in, mark them as
5 an exhibit, and put them in.

6 MR. HOLT: I agree with that, Your Honor. I would
7 suggest we do that. I think it would substantially reduce
8 the burden on the parties to go through the transcripts in
9 this exercise when we have a lot of other things to do just
10 to prepare. Unless there is a particular portion of the
11 transcript that Bartoldi feels is sensitive and needs to
12 bring to your attention, I would suggest that we mark the
13 entire thing as an exhibit.

14 JUDGE SIPPEL: Well, let us think in terms of
15 doing it that way, then, all right? When you are talking in
16 terms of what is going to get done between now and the 20th,
17 I mean, this list of exhibits should include the list of the
18 depositions. And, of course, any exhibits to the
19 depositions. And you can asterisk or something like that,
20 where there is a question of confidentiality. I am just
21 going to assume that anything that is not asterisked in some
22 way, I am assuming we are not going to have to pay any
23 attention to the confidentiality aspect of it.

24 And then, that way, we can focus on things like
25 relevance and admissibility. Which, again, should not take

1 that much time, because these questions have already been
2 asked about these documents.

3 All right. And most of these documents have been
4 cited as being relevant, because that is why they are there,
5 to support or to oppose the motion for summary decision.
6 So, this should not take too long.

7 If everything is agreed to, now, on these -- if it
8 is all agreed that all of these exhibits are going to come
9 in as non-confidential documents -- because I am not going
10 to need any kind of a memo written on that point -- it is
11 only on something very narrow that is going to be a contest.
12 But I do want to see something on all of these objections to
13 testimony, from, particularly, Mr. Lehmkuhl, on the
14 attorney/client privilege.

15 I think it is fair to tell the parties that
16 Mr. Lehmkuhl's involvement in this whole process, to me,
17 is -- not that it is more important than anybody else's
18 testimony -- but it is very significant to this case, I
19 believe, that he be able to explain exactly what the
20 procedures were with respect to STA requests. With respect
21 to any document that was submitted presigned. He was the
22 person that was doing the day-to-day line work -- legal work
23 for this situation, if I can put it that way. And he must
24 have a lot of factual information, in terms of nuts and
25 bolts and what was happening when.

1 When I say "he must", I say that it is logical
2 that he would, within the ability of people to recollect and
3 the complexity and the fast-moving action that we had
4 involved there.

5 So, I just say that -- and I am cautioning -- I am
6 saying that if there is a serious question about an
7 attorney/client communication and there is a question of
8 whether or not you want to object or not, I think you ought
9 to think in terms of, you know, how important is it to
10 protect that -- what you believe to be a confidential
11 communication? Because what frequently happens, after all
12 the fighting about a confidential communication, the
13 information comes out and it really is not that big of a
14 deal.

15 So, I mean, when you are preparing your witnesses,
16 please think it through that way, because it is going to
17 make it much easier for them, I believe, if we just get it
18 all out there.

19 I think that is basically -- the last thing that I
20 am -- I have not lost sight of the fact that Mr. Beckner was
21 very anxious to have an oral argument on the whole issue of
22 the summary decision. And it may be appropriate at the end
23 of all of the testimony to permit a -- I am trying to use
24 the right word now -- a focused argument on the overall
25 motion, obviously with the emphasis on what the hearing was

1 about. That should not take too long, but at least -- what
2 this proceeding is going to do is, it is obviously going to
3 bring the focus of all of us to bear in such a way on the
4 case that maybe it would make sense to have closing
5 arguments on the motion itself. But with the emphasis, as I
6 say, on the credibility.

7 MR. BECKNER: Your Honor?

8 JUDGE SIPPEL: Yes, Mr. Beckner?

9 MR. BECKNER: Obviously, I mean, I am happy if you
10 want to do that. I would suggest that, if we do that, we do
11 that -- I mean, the thought that I have, Your Honor, is that
12 if we can do that immediately following the end of the
13 testimony, sort of like you would do in a trial.

14 But if your desire is to have the lawyers address
15 not only the matters which were testified to at the hearing,
16 but sort of the bigger issue, then it might be more useful
17 to you to have that argument following the submission of the
18 proposed findings and conclusions.

19 Because, then, the lawyers conducting the argument
20 would be able to make reference to those proposed findings
21 as well -- in other words, not only from their side, but
22 from the other side -- and give you a comprehensive
23 presentation, if you will, that is based on everything that
24 has been dumped on your desk.

25 I throw that out as a suggestion, not as a real

1 strong recommendation.

2 JUDGE SIPPEL: All right, well, it is obviously
3 something that you want.

4 What about Mr. Pettit and Liberty's side of the
5 table? What are your views on this?

6 MR. SPITZER: Well, there is a sense, Your Honor,
7 that with proposed findings of fact and then reply papers,
8 there is, at some point, usually there is finality and
9 everything has been said. So, I am somewhat wary of setting
10 up 18 layers of briefing and argument after a hearing that
11 really, we anticipate, will be no more than two days. Of
12 course, I may be wrong about that, but that is my sense of
13 it at this point.

14 MR. PETTIT: I would add to that, as I understood
15 Mr. Beckner's original request for this, it was based on, I
16 think, the fact that there was no further formal process
17 under the Commission's rules. I mean, here, obviously,
18 there will be. There will be an opportunity for us to
19 focus, as Your Honor says, on what are the proposed findings
20 and what has been adduced from the testimony in a formal
21 written submission; in fact, two formal written submissions.

22 So, it may obviate sort of the underlying
23 necessity for some sort of oral argument to do essentially
24 the same thing.

25 JUDGE SIPPEL: All right. Mr. Weber?

1 MR. WEBER: Well, Your Honor, the Bureau does
2 believe that you have all of the information before you that
3 is necessary in order to render a decision, although we do
4 realize that both of the briefs before you are some 70-odd
5 plus pages and, therefore, that is a lot of information to
6 digest.

7 And if you have any questions or feel that oral
8 argument would be beneficial to you in order to help you
9 focus on what are the key points out of those thick
10 pleadings, we would be happy to come forward and present
11 oral argument. We just do not think it is necessarily a
12 requirement in order for a decision to be reached in this
13 proceeding. But we would be happy to present it, if it
14 would assist you in rendering a decision.

15 JUDGE SIPPEL: Well, that is fair. Mr. Holt?

16 MR. HOLT: Actually, I do not really have a
17 position one way or the other. I would need to talk to my
18 client about -- Cablevision is interested in participating
19 at some point in an affirmative way.

20 But I would just note, in response to Mr. Pettit's
21 comments, that the only proceeding that you established
22 today would not -- you know, it does not contemplate
23 discussion of issues outside -- you know, issues relating to
24 the hard wiring, et cetera, that would come up during a
25 closing argument, which would be broader, encompass more

1 issues than are contained in the summary judgment motion.

2 So, I am not so sure that Mr. Pettit's comments
3 were correct in the sense that this is an opportunity for us
4 to address the broader issues, because it is not.

5 MR. PETTIT: Let me hasten to agree with Mr. Weber
6 as well, Your Honor, if I might. The essential point, I
7 think, here, is getting you the information you need to make
8 a decision. And, obviously, if you feel that an oral
9 argument would help you do that. We are obviously going to
10 be there and we will obviously participate in that, sir.

11 JUDGE SIPPEL: All right. Okay. Well, I have not
12 hesitated for things if I think I need them. And I will
13 continue to do that. So, we will just leave that question
14 alone and, if I think it is appropriate at some point, I
15 will ask for oral argument. Okay, I think that --

16 MR. PETTIT: Your Honor?

17 JUDGE SIPPEL: Yes?

18 MR. PETTIT: I am sorry.

19 JUDGE SIPPEL: Go ahead.

20 MR. PETTIT: If I might raise one thing, with your
21 leave, one of the things that has been going here, in sort
22 of a parallel fashion, is the Bureau's 308 investigation. I
23 just wonder if we might get a status report on that? At
24 least we are very curious about it.

25 JUDGE SIPPEL: Well, he is not required to put

1 that on the public record.

2 MR. PETTIT: I understand.

3 JUDGE SIPPEL: If you want to say anything about
4 it, you can. If not, Mr. Weber, it is perfectly
5 understandable.

6 MR. WEBER: The only thing I would say, Your
7 Honor, is I know at the time where you authorized, or at
8 least stated, that the Bureau did have the right to conduct
9 a 308 while this proceeding was going on as well, you noted
10 that if the Bureau found the need to come back and request a
11 motion for summary -- or asked for an enlargement of the
12 issues, the Bureau could do that. And, at this point, the
13 Bureau is not expecting to come and ask for an enlargement
14 of the issues.

15 The Bureau does expect to come out with an order
16 tying up all of the ends, or all the issues involved with
17 the 308, but we do not plan on coming back and asking you to
18 enlarge the issues. And so, that is not a matter that will
19 need to be involved with this proceeding any more.

20 JUDGE SIPPEL: All right. Well, that pretty much
21 brings you up to date, I think, doesn't it, Mr. Pettit?

22 MR. PETTIT: It does. Thank you, Your Honor.

23 JUDGE SIPPEL: Okay. Now, let me just hit these
24 dates again. On the 20th of December, there will be an
25 exchange of witness lists and exhibit lists. If the

1 Time Warner side of this case is going to come up with any
2 witnesses, they are going to have to have a good reason as
3 to why you think that testimony from your side of the table
4 is going to be appropriate here. I mean, we talked about
5 that, but I just want to be sure that -- I am reviewing the
6 procedures here.

7 The exchange of exhibits will be on the sixth of
8 January. I will -- let's see, the ninth of January, I want
9 a bench memo on the lawyer/client privilege. The 10th of
10 January will be an admissions session. And the 13th of
11 January, we start with the live.

12 MR. BEGLEITER: Your Honor, I think Your Honor
13 also ordered a memo on the Lehmkuhl privilege.

14 JUDGE SIPPEL: That is the one I am talking about.

15 MR. BEGLEITER: I am sorry.

16 JUDGE SIPPEL: That is the one I am talking about
17 for the ninth. I have eliminated the need for a memo on the
18 confidentiality, because I am assuming that is not going to
19 be a problem. We can either deal with that informally -- I
20 mean, I am very satisfied with what I have heard discussed
21 here today, that you do not have to write me anything about
22 that, at least not yet.

23 But, yes, the Lehmkuhl privilege items, yes, that
24 is on the ninth. So, then, on the 10th, we have the
25 admissions session. And we might talk about some of those

1 privileges -- issues at the admissions session, particularly
2 in the context of receiving Lehmkuhl's deposition testimony.
3 I mean, if that is appropriate at that time; if I want to
4 raise it, I will. Then the live testimony starts on the
5 13th.

6 How about an order of witnesses? Do you have an
7 order of witnesses worked out yet?

8 MR. SPITZER: We have not thought about it, Your
9 Honor.

10 JUDGE SIPPEL: All right. Well, I am going to
11 leave that up to you. You have the burdens. Time Warner
12 has the burdens.

13 And we should finish by -- certainly, in that
14 week. I mean, you are hoping for two days for Time Warner.
15 But I am hoping that you are right; it should not be much
16 more than three days.

17 And then we will work on the two weeks from the
18 delivery of the transcript on the proposed findings. And
19 then, you have the opportunity to reply within one week from
20 there. And, in my estimation, that will do it. And I will
21 let you know if I need any oral argument or even if I have
22 questions.

23 If I have a technical question, would there be any
24 objection to trying to do that by telephone? I mean, a
25 telephone conference?

1 MR. BECKNER: No, Your Honor.

2 MR. HOLT: No, Your Honor.

3 MR. BEGLEITER: None, Your Honor.

4 JUDGE SIPPEL: I mean, it is obviously -- if it is
5 important enough, we can come up here and talk about it.

6 All right, that is it, then. I wish you well for
7 the holidays.

8 Mr. Begleiter, I certainly wish you well, too --

9 MR. BEGLEITER: Thank you.

10 JUDGE SIPPEL: -- in your situation. And the best
11 of luck, really.

12 MR. BEGLEITER: I am hoping that events beyond our
13 control do not intervene.

14 JUDGE SIPPEL: Well, as I say, I am very flexible
15 about that, because I have been down that road myself. So,
16 let me know as much ahead of time as you can.

17 Thank you very much.

18 ALL: Thank you, Your Honor.

19 JUDGE SIPPEL: We are concluded.

20 (Whereupon, at 10:26 a.m., the proceeding was
21 concluded.)

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REPORTER'S CERTIFICATE

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CASE TITLE: Liberty Cable Company, Inc.
HEARING DATE: December 12, 1996
LOCATION: Washington, D. C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Communications Commission.


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